SUPREME COURT, U. S.
APPENDIX

JUL 7 1971

E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. ~~1536~~ 70-110

WISCONSIN, PETITIONER,

vs.

JONAS YODER, ET AL,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF WISCONSIN

PETITION FOR CERTIORARI
FILED APRIL 1, 1971

CERTIORARI GRANTED MAY 24, 1971

INDEX

Page

Chronological List of Relevant Docket Entries 100

Criminal Complaint, Filed Nov. 14, 1968 103-104

Motion to Dismiss Made by Respondents, Apr. 2, 1969 104-105

Paraphrased Testimony from Petitioner's Supplemental Appendix 106-113

Paraphrased Testimony from Respondents' Appendix 114-126

Opinions of Wisconsin Supreme Court, Filed Jan. 8, 1971 127-153

Opinions of the Trial Court 153-183

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Nov. 14, 1968 - Summons and Criminal complaint filed County Court, Green County.

Apr. 2, 1969 - Motion to Dismiss made by respondents.

Apr. 2, 1969 - Trial to Court - County Court, Green County, Wisconsin.

Aug. 15, 1969 - Memorandum Decision rendered by County Court, Green County, denying motion and finding respondents guilty.

Aug. 15, 1969 - Judgment finding respondents guilty entered.

Aug. 22, 1969 - Notice of Appeal to Circuit Court of Green County filed.

Nov. 13, 1969 - Memorandum Decision of Circuit Court of Green County rendered affirming Judgment of County Court of Green County finding respondents guilty.

Feb. 3, 1970 - Stay of Execution filed.

Feb. 5, 1970 - Notice of Appeal to the Wisconsin Supreme Court filed.

Jan. 8, 1971 - Opinions and Judgment of Wisconsin Supreme Court rendered reversing Judgment of Circuit Court of Green County.

State of Wisconsin *Green* County Court Criminal Branch

STATE OF WISCONSIN,

vs. ss. CRIMINAL COMPLAINT

Jonas Yoder,

Defendant

K. J. Glewen being first duly sworn complains and says that did, on the day of ,1968 at the Town of New Glarus, in said County, did unlawfully having under his control, as the father of Freida Yoder a child under the age of 16 years, to wit; 15 years of age fail to cause such child to attend school regularly, during the full period and hours of the 8/28/68 - 10/23/68 of 1968, in the Public Schools of School District New Glarus Joint Dist No 1 of Green & Dane county, Wis. in which he resides, or in any private school, or other Public School, or Vocational School; such child being in proper and mental condition to attend school, and not being exempted for any good cause, by the School Board of the district in which the child resides, and said child, not having completed the full Four Year H. S. course, nor said child having received instructions elsewhere as must be approved by the State Superintendent, all contrary to Sub-Sections (1) (2) (3) and (4) of Section 118.15 of the Wisconsin Statutes.

(The basis or grounds of the complaint is school records and personal knowledge of K. J. Glewen, Supt. of the above described school district; the records being in the custody of said K. J. Glewen, as Supt. of the above named school district)

and against the peace and dignity of the State and prays that the said defendant might be arrested and dealt with according to law;

/s/ K. J. Glewen - Supt.
COMPLAINANT

Subscribed and sworn to before me this *23rd* day of *October*, 1968.

/s/ L. A. Kaemig
☒ District Attorney ☐ County Judge

Identical complaints were filed naming the other two respondents.

STATE OF WISCONSIN, In the County Court of Green County
vs. ss. (Criminal Branch)
ADIN YUTZY,
Defendant No. , Term 1969

MOTION TO DISMISS

AND NOW, this *2nd* day of April, 1969, Motion to Dismiss the complaint in the above captioned action is hereby made on the grounds that the Wisconsin Compulsory School Attendance Law (Section 118.15 of the Wisconsin Statutes, L. 1967 c. 92 s17, eff. Jan. 1, 1968, L. 1967, c 313 s18, eff. Jan. 13, 1968) is unconstitutional as applied to the defendant Adin Yutzy, and as it is applied to Vernon Yutzy, a child under the control of the defendant in that as so applied it deprives him and his said child of religious liberty guaranteed by Article I, Sections 1 and 18 of the Constitution of the State of Wisconsin and by the First and Fourteenth Amendments

to the Constitution of the United States, and of rights of association, of privacy, and of learning guaranteed by Article I, Section 1, of the Constitution of Wisconsin and protected by the Fourteenth Amendment to the Constitution of the United States.

William B. Ball
Ball & Skelly
127 State Street
Harrisburg, Pennsylvania

Thomas C. Eckerle
Risser & Risser
15 West Main Street
Madison, Wisconsin

ATTORNEYS FOR DEFENDANT

PARAPHRASED TESTIMONY FROM PETITIONER'S SUPPLEMENTAL APPENDIX IN THE COURT BELOW

TESTIMONY OF STATE'S WITNESS,
KENNETH J. GLEWEN

EXAMINATION BY
MR. MARTINSON:

My name is Kenneth J. Glewen and I am the School District Administrator of the New Glarus District #1 School, located in Green and Dane Counties. I have had that position for 3 years. My duties are to administer the school financial affairs and transportation, the hiring and releasing of teachers * * * and see to it that all children are in attendance from the ages of 7 to 16 years of age * * *.

As a teacher and administrator, I have been employed 16 1/2 years. I am acquainted with the three defendants in the present case and I know Freda Yoder is the daughter of Mr. Yoder, the defendant, and Barbara Miller, the daughter of the other defendant, as well as Vernon Yutzy.

These children attended public school in New Glarus during my tenure as administrator and they graduated from 8th grade. MR. MARTINSON: "Is there any question the ages are correctly stated in the complaint?

MR. BALL: There is no question.

MR. MARTINSON: I think, Your Honor, the ages of the children are correctly stated in the complaints."

I made an investigation to determine whether or not the two children mentioned attended school at the time between August 28, 1968, and October 23, 1968. * * *

There is not a vocational, technical, adult education school within the New Glarus District.

None of these 3 children were mentioned as having been enrolled in the school at the time I made the investigation. * * *

There is a public high school within the New Glarus district. There is not a private high school within the district. The term "high school" means generally 9th, 10th, 11th and 12th grades. In some areas they have reorganized, so they have a junior high school which is quite often 7th, 8th and 9th grades; and then the senior high school would be 10th, 11th and 12th grades. The curriculum of the school is more difficult and continuing from that of the first eight grades, might differ a little in that there are more elective courses that allow students to pursue particular things they have more interest in. The ages for attendance in high school are generally between 13 and 18 years. There are many good private high schools in the State of Wisconsin that serve their population from grades 9 through 12. * * *

Based on my investigation and observation and information that I have secured, and based upon my knowledge and experience, the schools operated by the Amish could not be classified as high schools. They do not offer a four year course beyond the elementary grades.

CROSS-EXAMINATION OF MR. GLEWEN
BY MR. BALL:

My complaint was filed and based not merely on the absence of the children, but due to the fact that they were not enrolled in any school. They were not enrolled either in the parochial school or the public high school in our district. The complaint was not based in any sense on disobedience or delinquency.

MRS. FOLA THACKER,
DIRECT EXAMINATION
BY MR. MARTINSON:

My name is Fola Thacker a[redacted]ition to being a housewife, I am clerk of the New Gl[redacted]ol Board. I have been clerk for about 3 years. As clerk I have custody of all the books and records and documents pertaining to the school board. None of the three children mentioned have been exempt for legal cause.

DEFENDANTS' TESTIMONY,
KENNETH GLEWEN* * *

EXAMINATION
BY MR. MARTINSON:

The teaching and instruction that is given in the high school in New Glarus has been approved by the Department of Public Instruction of the State.

JOHN HOSTETLER,
DIRECT EXAMINATION
BY MR. BALL:

* * * MR. MARTINSON: I take it you will be referring to the Old-Order Amish only?

A. Right

Q. What are the chief Old-Order beliefs?

A. The Amish have been called Biblicists by historians and theologians. Obviously many groups claim the Bible the central issue of their religion. The Amish are peculiar, however, in four respects in regard to their beliefs. They require--it can be summed up in four--as a part of their way of salvation they require a church community that is separate from the world. Not that they are isolated in this respect, they are not isolated living in monasteries, but are

disbursed in our society. The separation is part of their religion. The Scriptures to them say, "Do not conform to the World, do not be unequally yoked together with unbelievers." These two things are repeated in their sermons and teachings.

The second part of their religion, after the maintenance of the church-community, is the baptismal vow that requires ethical obligation to God and man.

And the third aspect is the maintenance of community rules that are binding on the members. These rules are made in consensus by each congregation under the leadership of a minister.

And finally, I think we would say, central and close to the religion is the affinity to nature-to soil, the simple life, the moderate life best expressed in the rural society. * * *

CROSS-EXAMINATION
BY MR. MARTINSON:

* * * There is a preferred pattern of isolation in the Amish community, but they do not want total isolation of the world, they want to be in the world but not of the world, not in its spirit.

The Amish people justify sending their children even through eighth grade and not through sixth or not to school at all because of the development of education in this country partly. There are more and more requirements in 4th, 6th and 8th grade. That is part of the answer and part of the reason is the Amish want their children to learn the basic skills, and they got this in the one-room public school as long as we had them but once they were evaporated by consolidation there

was a different question. * * * I do not know what curriculum is taught in the high school, but assuming that a child would not be required to indulge in sports and athletics, etc., would not make the attendance by the Amish less objectionable.

The theory is that the children are being exposed to a worldly influence. The Amish child is not restricted to his home grounds, he goes to town and sees other people and other children, but by going to school he is learning a different way of life. It is the worldly influence that the Amish object to. There is a general consensus that the Amish faith will permit children to go through 8th grade of public school but after that the child does not go to a single day of high school. * * * I know of nothing in the Amish religion specifically saying, such as a rule or illustration, that no child of Amish faith could properly attend high school. The rules of the Amish church as such are simply the oral consensus in the community; this represents, I would say, perhaps the most substantial rule of evidence. The church rules are rarely put in print. On occasion in the past there have been some rules printed but they are usually associated with a particular period or whatever issue is present at the time.

My studies indicate that the Old-Order Amish population is much more than it was fifty years ago, there is a gradual increase, but at the same time the Amish have also lost members to their church through the years, and I would say of the total migration to the country, probably two-thirds have been assimilated non-Amish people today. The Amish religious membership is non-static.

TESTIMONY OF DONALD ERICKSON,

DIRECT
BY DEFENDANTS:

I don't think that the Amish have any choice at all educationally. I have never seen a school yet that impresses me either culturally or religiously; there isn't such an animal as a culturally and religiously neutral school. * * * There is no such thing as non-education, every child is educated through the process of child socialization. * * * As to whether education is to equip you to make your way in the world, depends on what you mean by "make your way in the world". Education or schooling or whatever you call it does equip one to function in some culture, and in those terms yes that is a function of education. In my view to prepare the child to lead some kind of adult life with some kind of independence, surety and competency. * * * And whether expressed or implied that we must force upon every child an education that fits him for one particular mode of life, it seems that adults have a right to different ways of life, certainly the child should have the freedom to live any one of the number of ways of different ways of life. If we had one system of education imposed on everyone, this would be harmful to the general welfare.

For the majority of children the typical system of education that we provide the public schools for the most part seems pretty fitting. But I think even here that our educational systems have effects on children that are very bad and this is one reason that I have a particular interest in the Amish case. * * * I am deeply disturbed about the tendency

of our State Department of Education, and some people at the lower educators level, always looking identical and to set up criteria that hasn't a bit of research behind it. * * *

In answer to the question of why a child should not obtain more education in the pattern of a public high school, I would particularly refer to a study conducted by Robert Kollmorgan, he is now Professor of Geography at the University of Kansas, but his conclusion was basically this, that if the functions of education for an Amish child is to prepare him to be an Amish farmer, or an Amish housewife, that indeed a high school education tends to conflict with this purpose, not only because of what it does but what it takes the child away from. When he is in adolescence and needs to be acquiring Amish attitudes of hard work and self appliance, if instead of being on the farm working with his father and developing these attitudes and skills he is in high school, he becomes attracted to intellectual pursuits and this is disfunctional as far as the avowed goal. I don't think it is sensible to assess an education without asking, "what is it leading to".

CROSS-EXAMINATION
BY MR. MARTINSON:

I have strong feelings on the subject. I have been a professor since 1962, and I went through elementary and high school and the University. * * * I dropped out of high school for four years, but apart from this, I persisted in my education. I know a little bit about what is entailed in coping with the world without a high school education. * * * I saw fit to get an education which qualified me for my present occupation because number one, I was not trained to be an Amishman, I was not preparing for other vocation in which that education would be necessary. I knew, as everyone

knows, the PhD. is necessary to a career as a professor. I happened to be interested in the professorship. I enjoy it and I prepared for it, and for that career that kind of education is necessary.

PARAPHRASED TESTIMONY FROM RESPONDENTS' APPENDIX IN THE COURT BELOW

TESTIMONY OF STATE

Cross Examination by Mr. Ball

KENNETH J. GLEWEN, School Administrator at New Glarus Public School District No. 1, for the State, testified:

The Amish opened their own elementary school around the middle of September. After this school opened I was in communication with the Amish. Thirty-seven Amish children who had been attending the public elementary school, in September, when the Amish school was put up, transferred to the Amish school. This resulted in a loss of State revenue to the New Glarus public school district in the vicinity of $18,000. I asked the parents of these children to hold off the transfer until the third Friday of September when we count our school population. The Amish parents refused to concede to my suggestion that they not transfer their children. I became aware of their refusal in the later part of August. I then brought the criminal complaint in the present action.

* * *

Pupils at New Glarus High School are expected and encouraged to become a part of the general life of the school and to form associations. We do encourage their social activities in that they get along with their peers. The school sponsors proms and similar things. The school,

in its curriculum, and generally, encourages the competitive spirit, for example, through sports. The school tries to teach values. We have a form of unity. We try to teach character values in sportmanship and values of good conduct, etc. Moral training is done in various ways, in conjunction with health, and also general science.

* * *

In connection with the teaching of fair play, loyalty to country, etc., we do not offer the Ten Commandments as a norm or standard to be followed. We do not have as such in our curriculum the Ten Commandments. Where a child would seek to know what ultimate norm lies behind a law, he would be referred to the school administrator.

* * *

Statement of State's Attorney

ROBERT D. MARTINSON, Deputy, Attorney General, State of Wisconsin, stated:

We have no objection to stipulating the defendants are sincere in their religious belief.

* * *

TESTIMONY OF APPELLANTS

Direct Examination by Mr. Ball

JOHN ANDREW HOSTETLER, professor, Temple University, Philadelphia, specialist on Amish society and religious beliefs of social groups:

The Old Order Amish constitute a religion. It has been in existence since 1693.

* * *

The Old Order Amish require a church-community that is separate from the world. The separation is part of their religion. The Scriptures tell them: "Do not conform to the world, do not be unequally yoked together with unbelievers." They also take a baptismal vow that imposes on them ethical obligations to God and man. Thirdly, they regard the rules of their church-community as binding on their members. Fourthly, the Amish religion closely relate to affinity to nature, the soil, the simple rural life.

The concept of separate from the world is part of the process of the saved community; you need the assistance of the saved brotherhood in order to get to the final destination which in the church and religion is heaven. This is why they come together as Amish: one cannot be a part of the unbelieving world, have the same values. The goals of the Amish culture with reference to children do contrast sharply with the values that are promoted in non-Amish society. And I think that if the Amish youth are required to attend the value system of the high school as we know it today, the church-community cannot last long, it will be destroyed.

[That] the Amish insist on retaining their own children is not based on stubborness but on their central religious belief, and if the Amish are forced to attend school against

the religion of the church-community, and to remain in the school teaching values contrary to their belief, great psychological harm can be done to the children. We have examples of this in various other groups in the United States. The studies have shown that when these children are placed in a setting where they have to choose between the ways of their parents—the values of their parents and a whole new set of conflicting values—many of the children end up in alienation.

The public school is really not equipped in curriculum and social environment to promote the values promoted in the Amish society.

The objection to education beyond the elementary grades seems to me grounded in the kind of informal learning that takes place in the Amish setting versus in the high school; and certainly the environment is very different in these two places. The public school breaks down the period of isolation that is needed for personality development, etc. in the culture of the Amish. That is to say, when the teenager arrives through the 8th grade he is forming his own friendships, he is given great responsibility in the Amish society, driving horses, working in the fields, which the suburban child is not getting. He is appreciated more in the home in arriving at the age of 16, so in a sense if put in the high school he is taking a backseat in his own culture in this particular area of his life.

In the Amish view the high school is higher learning, it is an effort toward wisdom which is wisdom not responsible to the community, so the world by the Amish is considered to be highly educated but plainly corrupt; it militates against the obedience to the community and religion.

The Amish would consider the high school even in their own culture as deterrent to a way of salvation, as an introduction of topics that are competing against the value system, against the religion in their own society.

It is part of the Amish parent's duty to teach his children the Amish way of life. An Amish man is morally obligated in the Scriptures to teach his children in the ways of God, and if he doesn't do this he is in danger not only of the censure of the church-community, which has specific rules against world education, but endangers his own salvation in sending the children into an eternal world which is believed to be ahead.

* * *

Cross Examination by Mr. Martinson

The central belief is the maintenance of the separate community once a person takes a vow of baptism—and they abide by this and it is a promise for life.

* * *

The Amish object to the environment of the public high school, in particular because of the kind of learning that goes on there. The Amish in their culture are used to learning by example—seeing older ones—while in the high school there is a great emphasis put on intellectual scientific topics. The emphasis in the Amish environment is to learn how one should live. There is in fact not much time for this in the high school with the teaching of sports and sciences and fun and self distinction, which is markedly different from

the environment to which the Amish belong. The theory is that of the children being exposed to worldly influences, to the pecuniary attitudes, the consumer aspect, which is quite different from their specific community. And in the setting of people of another faith.

The rules of the Amish church as such are simply the oral consensus of the community; this represents, I would say, the most substantial rule of evidence. There are church rules, but these are rarely put into print.

* * *

There is a great deal of difference in what education means, education for what. If it is so that the child can make his or her place in the world, it depends which world.

It is a myth to say that all education is good. Education must be tied to a culture that emotionally guides the child in the direction he knows he is going to live when he is an adult.

The baptismal vow is taken as an adult.

* * *

Redirect Examination by Mr. Ball

I did not mean to suggest when Mr. Martinson asked me about rules within the Amish community and whether they are in printed form, that there are no rules which the Amish regard as fully binding upon them.

Education means a discipline of character and intellect which will be an aid in living a useful life. A good education does not mean simply book learning or the acquiring of a great deal of information, or a scholar that has mastered

the many branches of learning that are taught in the schools or universities of today. It does mean, however, a store of practical knowledge and skill that can be diversed between that which is good and useful and noble, and that which is a good use in a way of learning the arts and sciences.

When, on cross examination by Mr. Martinson, I spoke of "two worlds", I meant that Amish education has as its basic goal the achieving of the other world, which is Heaven. An education which did not direct itself to that goal would not be education to the Amish.

Under a grant from the U.S. Office of Education, a study has been made of children of the Old Order Amish community. We wanted to know whether the pupils in it were being prepared for the kind of style of living which conformed also to the standards and goals of an adult world; we wanted to know whether these children are deprived; what their I.Q. was, so we gave them an achievement test in four or five different states. In general the I.Q. performance on a non-verbal test was above or equal to the norm of children in the public school, or normal Amish children. On the Myers-Briggs Type Indicator the Amish indicated a high sense of social awareness, and the category having the highest frequency of response came out with the personality description of this type: "quiet, friendly, responsible and conscientious. Works devotedly to meet his obligations and serve his friends and school. Thorough and painstaking, accurate with figures, but needs time to master technical subjects as reasoning is not his strong point. Loyal, considerate, concerned with how other people feel even when they are in the wrong." So we compared with the public school pupil achievements, and Amish pupils in their one-room schools have achieved very equal on these standardized tests.

* * *

Cross Examination by Mr. Martinson

REV. REUBEN HIRSCHBERGER, for Appellants:

The Amish religion does not forbid sending the children to the school through the 8th grade: the instruction the children get in those grades is not against the teachings of the Amish religion. When the children get to that age, we feel that someone else has to take hold, the farming or whatever the occupation is, and you got to get that religion in them just like when you plant a tree, you got to plant it straight or it always will be crooked. When a child reaches a certain age, normally that is when the child gets through 8th grade, is when you must begin to teach him the way of life of the Amish people. The reason why the Amish children do not go to high school is not so much what the high school teaches as the fact that they have arrived at the age they must be taught the Amish religion and the religious beliefs. Another reason is the temptations. We know we cannot get away from temptations but maybe we can avoid a few of them.

* * *

Redirect Examination by Mr. Ball

We definitely object to our children getting sex education in a high school.

* * *

WILBUR E. DEININGER, for Appellants, upon direct examination by Mr. Ball, testified:

Sheriff, 1963-1967; Undersheriff greater part of 1967 and 1968; now member of Department of Police, City of Monroe.

I am aware of the Old Order Amish in this county. To my knowledge no teenage members of this group have ever been apprehended or arrested in Green County for murder, burglary, armed robbery, arson, assault, possession of narcotics; vandalism, loitering, theft, reckless driving. I know of no Amish people of high school age who have been engaged in any violence. In my opinion the Amish people of Green County present no threat to the community.

* * *

Redirect Examination by Mr. Ball

I am quite sure we would know if an Amish person were involved in crime.

* * *

RAY F. KASKEY, for Appellants, upon direct examination by Mr. Ball, testified:

Director of Department of Social Services for Green County for nine years; engaged in social work for 25 years; familiar with social conditions in Green County.

No Amish people in Green County receive public assistance or are unemployed; no Amish have illegitimate births. I know of no Amish who are in publicly supported homes for the aged or who are beneficiaries of free county services for the indigent who are physically ill, mentally ill or alcoholics.

The Amish people in the county do not add to the social burdens which the taxpayers of Green County have to bear.

The fact that Amish children do not attend public or private full-time high school has no effect in adding to the social burdens carried by the taxpayers of Green County.

* * *

FRIEDA YODER, for Appellants, upon direct examination by Mr. Ball, testified:

Fifteen years old, daughter of Appellant Janet Yoder. Believes in the Amish religion. Wants to live according to the way of her people, the Amish way. Going to high school would be against her religious beliefs. The reason she is not going to high school is because of her religion, and that is the only reason.

* * *

DR. DONALD A. ERICKSON, University of Chicago, for Appellants, upon direct examination by Mr. Ball, testified as follows:

Associate Professor of Education, University of Chicago, Ph.D. in Education; conducted studies of Amish education; editor of various educational journals.

* * *

There is no such thing as non-education; every child is educated through the process of child socialization. The function of education is to prepare a child to lead some kind of adult life with some kind of independence and surety and competency. The Amish definitely provide for their children of high school age what could be called an education. I would be inclined to say they do a better job in this than most of the rest of us do.

* * *

If somebody doesn't want his child to have any formal education at all this is not what the Amish claim. This is not what the Amish stand for, they do not take a position like this, their claim for religious freedom in the various cases has not rested upon the prospect that the child not have any education at all. In that case one should argue that the welfare of the child becomes a part here, if he doesn't receive any formal education. Even as an Amish, if he received no education at all he would have trouble marketing and etc.

I would particularly refer to the study conducted by Robert Kollmorgan, he is now Professor Geography at the University of Kansas, but his conclusion was basically this, that if the functions of education for an Amish child is to prepare him to be an Amish farmer, or an Amish housewife, that indeed a high school education tends to conflict with this purpose, not only because of what it does but what it takes the child away from. When he is in adolescence and he needs to be acquiring Amish attitudes of hard work and self appliance, if instead of being on the farm working with his father and developing these attitudes and skills he is in the high school, he becomes attracted to intellectual pursuits and this is disfunctional as far as the avowed goal. And I don't think it is sensible to assess an education without asking, "what is it leading to".

As an educator and interested in the common welfare of the people of the United States, I think anybody should be allowed to head for the goal of agriculture. It is not repugnant to my views on the subject of education on the common welfare if someone suggested a person not go into book learning and on to the study of science, literature, art and so on.

* * *

The Amish are in a fortunate position respecting the schooling which they conduct for children beyond the eighth grade. It is learning by doing—an ideal system. We are learning that current education is detached from the real world and that in the things they talk about the pupils do not become involved or have real responsibility. The lack, in modern education, of a clear connection between learning and doing is responsible for much of the student actions that we have today.

* * *

Cross Examination by Mr. Martinson

The Compulsory School Attendance Law should not be applied to the Amish because if we force the Amish children into a regular high school we have no guarantee that they will respond to the program. I will go further. On the evidence of many social groups there is a very good probability that this will backfire; it can produce the kind of psychological problems Professor Hostetler spoke of, it will disrupt the Amish community, and the net impact will be negative.

In my opinion we should not supersede the religious belief of the parents unless we can demonstrate that the danger to the child is very clear. It is not altogether the

law which imposes this standardized system of education that we seem to have; much of it is imposed by the customs of educators. We have customary ways of doing things which tend to be written not only in laws but in courses in the universities, and I think that any optional group tends to crystalize on certain ways of performing. Both I and many other scholars feel that we have too soon crystalized our educational program. It was standardized on what is average in America with no consideration for the ethnic groups, the minority groups. When an education is fitted to the people, they will not move into society and perform with security and a sense of responsibility. They become public charges, fuel for revolt. This is most dramatic when it comes to ethnic groups; the malfunctions for the mainstream are not so apparent, they show up in terms of ulcers, the preoccupations that some manifest, the cutting down of diversity in the population, it is all much more subtle. It is harmful if we are all pressured to a single way of operating, if we cut down on the ethnic diversity in our society, if we have a city full of people who can't get jobs and can't perform.

The simple elementary school for the Amish performs a fairly important function, helping them in communication and to conduct marketing in the outside world. It fits them to deal with people on the higher education level to the extent that they need to. But we must recognize that Amish society is a society geared to the notion of a degree of isolation. These people aren't purporting to be learned people, and the self sufficiency of the Amish community is the best evidence I can point to: whatever is being done seems to function well.

* * *

FILED
JAN - 8, 1971
FRANKLIN W. CLARKE
Clerk of Supreme Court
Madison, Wisconsin

State Nos. 92, 93, & 94

August Term, 1970

STATE OF WISCONSIN IN SUPREME COURT

State No. 92
STATE OF WISCONSIN, Respondent,

vs.

JONAS YODER, Appellant.

State No. 93
STATE OF WISCONSIN, Respondent,

vs.

ADIN YUTZY, Appellant.

State No. 94
STATE OF WISCONSIN, Respondent,

vs.

WALLACE MILLER, Appellant.

APPEAL from a judgment of the circuit court for Green county: ARTHUR L. LUEBKE, Circuit Judge. *Reversed.*

The appellants Jonas Yoder, Adin Yutzy, members of the Old Order Amish religion, and Wallace Miller, a member of the Conservative Amish Mennonite Church, were convicted in the county court of violating Wisconsin Compulsory School

Attendance Law (sec. 118.15, Stats.). Their children, Frieda Yoder, aged 15 years, Barbara Miller, 15, and Vernon Yutzy, 14, are graduates of the eighth grade of the New Glarus public school. The appellants refused to enroll them in the public high school for the fall 1968 school term as required by the compulsory school law,[1/] and were fined $5 each. The convictions were affirmed by the circuit court.

The appeal to this court and the defense in the lower courts involve the fathers' right to religious liberty and whether sec. 118.15, Stats., as applied to them violates the Free Exercise Clause of the First Amendment of the Constitution of the United States,[2/] made applicable to the states by the Fourteenth Amendment. The trial court held the compulsory school law did interfere with the freedom of the appellants to act in accordance with their sincere religious beliefs but concluded the statute represented "a reasonable constitutional exercise of a governmental function of the state."

HALLOWS, C.J. No liberty guaranteed by our constitution is more important or vital to our free society than is a religious liberty protected by the Free Exercise Clause of the First Amendment. This appeal poses the question of whether the compulsory education law of this state, as applied to the Amish, infringes their religious liberty and, if so, whether such interference is constitutionally justified.

[1/] The pertinent provisions of that statute are:

"(1) Unless the child has a legal excuse, any person having under his control a child between the ages of 7 and 16 years shall cause such child to attend school regularly, during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in session, to the end of the school term, quarter or semester of the school year in which he becomes 16 years of age."

[2/] The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Fourteenth Amendment reads: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

If the compulsory education law is to withstand the appellants' constitutional challenge, it must be either because the statute does not interfere with a constitutional freedom to act in accordance with their sincere religious beliefs or because the burden on the free exercise of appellants' religion is justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . . " *NAACP v. Button* (1963), 371 U.S. 415, 438, 83 Sup. Ct. 328, 9 L. Ed. 2d 405. The determination of whether a law infringing religious liberty is justified requires the weighing of the burden on the free exercise of one's religion and the importance of the state's interest asserted in justification of the substantial infringement. *Sherbert v. Verner* (1963), 374 U.S. 398, 83 Sup. Ct. 1790, 10 L. Ed. 2d 965.

Is There Any Infringement
Of The Free Exercise Clause?

"The Amish as an independent sect were founded in 1693, near Erlenbach, Bern, Switzerland. Jakob Ammann, a Swiss Anabaptist and a follower of Menno Simons and the Mennonites, broke with his church in disagreement over what he felt were unwarranted departures from traditional practices. The Amish, the followers of Ammann, thus dedicated themselves to maintaining the old practices and resisting any capitulation to the sin of worldliness. . . .

"The Old Order Amish are the most conservative and traditional of the several branches of the sect, numbering about fifty thousand children and adults in the United States." *The Amish and Compulsory Education,* 53 Va. L. Rev. 925, 933.

The rules of conduct of the Amish religion in its folk culture context are incorporated in the Ordnung of each community but ordinarily are not articulated and codified in writing as some tenets in other theistic religions. Compliance with the Ordnung is enforced by sanctions of excommunication and shunning. *See* Hostetler, *Amish Society* (1963), p. 63; Yoder, *Caesar & The Meidung,* 23 Mennonite Qtrly. Rev. 76, 98 (1949). Many of the tenets of the religion are found in *The Confession of Dortricht* (1632)[3]/ discussed in *Commonwealth v. Beiler* (1951), 168 Pa. Super. 462, 79 Atl. 2d 134, 136. The lack of codification of the Amish tenets is of no concern. The Free Exercise Clause does not require the codification of religious tenets nor does this clause define the scope of religion. For its purpose, religion defines itself and binds the individual conscience.

At the trial the appellants put in evidence by expert testimony the full range of the Amish religous beliefs and the tenets of the Old Order Amish religion. Dr. John A. Hostetler[4]/ testified the Amish religion requires as a part of the individual's way of salvation a church community separate from the world. The Amish separateness is dictated by their religious belief of what God's will is for them and thus all the means by which they maintain this unique separateness have religious meaning.

3/ It is stated by Robert C. Casad in his article entitled *Compulsory Education and Individual Rights,* 5 Religion And The Public Order 55, the most basic tenet of the Amish religion of separation from the world relies on the Scripture, Romans [12:1], "Be not conformed to this world, but be ye transformed by the renewing of your mind that ye may prove what is that good, and acceptable, and perfect, will of God," and II Corinthians 6:14, "Be ye not unequally yoked together with unbelievers; for what fellowship hath righteousness with unrighteousness? and what communion hath light with darkness?" To the Amish, these beliefs "are not mere social philosophy: They are fundamental to the whole question of their existence on earth."

4/ Professor at Temple University; author of "Amish Life (1968)," "Amish Society (Revised Ed. 1968)."

The Old Order Amish religion dictates that the Amish child from the inception of adolescence live according to the mode of life in the Amish community; that he should not attend high school since any high school, public or private, constitutes a deterrent to his salvation. The period of adolescence is critical in the religious and cultural development of the child because at this time the child enters gradually into the fullness of Amish life, is given responsibilities which would be directly interfered with if he were compelled to go to high school, and accepts adult baptism. Thus, the Amish religion requires the avoidance of worldly educational environment and imposes the duty on the adolescent to become mature in a wisdom different from what others may regard as wisdom and in skills and responsibilities which are proper and fitting for a life different from what others may wish to pursue. To the Amish, how long a child should attend a formal school is a religious question.

This court does not evaluate, and in fact is prohibited from evaluating, a religious belief for ecclesiastical purposes. *Abington School Dist. v. Schempp* (1963), 374 U.S. 203, 83 Sup. Ct. 1560, 10 L. Ed. 2d 844; *Presbyterian Church v. Hull Church* (1969), 393 U.S. 440, 89 Sup. Ct. 601, 21 L. Ed. 658. Irrelevant, too, is this court's opinion, if it has one, of the validity, the reasonableness, or the merits of the Amish religious beliefs.

The state's argument that the appellants' refusal to obey the compulsory school law is no part of their worship but merely a practice or a way of life cannot be accepted. The Free Exercise Clause is not restricted in its protection to formal ritualistic acts of worship common in theistic religions but also includes the practice or the exercise of religion which is binding in conscience. *See Sherbert v. Verner, supra,*

and *In Re Jenison* (1963), 265 Minn. 96, 120 N.W. 2d 515; (1963) 375 U.S. 14, 84 Sup. Ct. 63, 11 L. Ed. 2d 39; (1963), 267 Minn. 136, 125 N.W. 2d 588. There is no question that, as found by the trial court, the compulsory education law infringes upon the free exercise of religion by the appellants within the scope of the protection of the First Amendment.

The Weighing of Conflicting Interests.

(A) The Burden on the Constitutional Right.

In balancing the competing factors to find the justification of the compulsory school law, we must first examine the burden caused by its interference with the free exercise of the appellants' religion. How heavy is the burden? We think it is clear the burden of compulsory education is a heavy one. The law commands the appellants to perform affirmative acts which are repugnant to their religion. To the Amish, secondary schools not only teach an unacceptable value system but they also seek to integrate ethnic groups into a homogenized society, resulting in a psychological alienation of Amish children from their parents and great harm to the child. The law also places a choice upon each of these fathers to either obey its commands and risk the loss of his salvation or to disobey the law and invite criminal sanctions. The sincerity of the appellants in their beliefs and in their religion cannot be questioned; such sincerity was stipulated in the record.

The impact on the Amish of compulsory education laws is so severe that in other states where they were required to send their children to public schools, they sold their farms and sought religious freedom elsewhere. Some of the Amish in Wisconsin were the victims of daily fines which became so

severe that they were suspended by the governor of Iowa and they sought religious freedom here, in a spirit and with a hope not unlike the Pilgrim Fathers who came to America. *See Clippings: Relation of religion to secular society: Separation of church and state: Church organization and membership,* Wis. Legislative Reference Library. When the Amish can no longer move, the impact may result in the extermination of their religious community.

There is another impact on the Amish children themselves if they are required to go to high school. They would experience a useless anguish of living in two worlds. Either the education they receive in the public school is irrelevant to their lives as members of the Old Order Amish or these secondary school values will make life as Amish impossible. At the trial, one of the children testified she did not want to go to high school. Since the children are not being sued as truants, we do not reach the question of whether they have an independent right of the free exercise of their religion to be protected here. We view this case as involving solely a parent's right of religious freedom to bring up his children as he believes God dictates.

(B) *Compelling State Interest.*

On the other side of the scale we have compulsory education which in itself is not a compelling interest although it is within the state power to regulate. It is not sufficient for the state to show a regulation as a direct relation to a policy goal. A compelling interest is not just a general interest in the subject matter but the need to apply the regulation without exception to attain the purposes and objectives of the legislation.

Compulsory education in the United States began in 1642[5]/ and in this state in 1889. The two Wisconsin cases[6]/ which have considered our compulsory school law add little to the issue because neither involves any claim of exemption based upon a religious right.

General interest in education was expressed in *Meyer v. Nebraska* (1923), 262 U.S. 390, 400, 43 Sup. Ct. 625, 67 L. Ed. 1042, when the court said, "The American people have always regarded education and the acquisition of knowledge as matters of supreme importance which should be diligently promoted." In *Brown v. Bd. of Education* (1954), 347 U.S. 483, 493, 74 Sup. Ct. 686, 98 L. Ed. 873, the court noted that education was required in the performance of our public responsibilities and was the foundation of good citizenship; it was the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and helping him to adjust normally to his environment.

The Amish point out that the education talked about in these cases is for a world which is not theirs; that their cultural values are different; that their life requires no professional training and that two years of high school education does not help Amish children to adjust normally to their Amish environment. The Amish claim, with compelling merit, that their education produces as good a product as two additional years' compulsory high school education does.[7]/

---

[5]/ Note, *The Amish and Compulsory Education*, 53 Va. L. Rev. (1967), 925, 930.

[6]/ *State v. Freudenberg* (1917), 166 Wis. 35, 163 N.W. 184; *In Re Alley* (1921), 174 Wis. 85, 182 N.W. 360.

[7]/ Defense witness Wilbur E. Deininger, sheriff of Green county from 1963 to 1967, undersheriff in 1967 and 1968, and a present member of the city of Monroe department of police, testified that, to his knowledge, no teenage member of the Old Order Amish group dwelling in Green county had ever been apprehended or arrested for crime or engaged in acts of violence.

Defense witness Ray F. Kaskey, for the past nine years director of the department of social services for Green county, testified he knew of no Amish in the county who had been recipients of public assistance, had been unemployed or received unemployment compensation, had illegitimate births, been residents of publicly supported homes for the aged, the indigent, the physically or mentally ill, or alcoholics. He further stated the Amish people did not add to the social burdens which the taxpayers of Green county must bear, and that the fact the Amish children do not attend high school has no effect in adding to the social burdens carried by these taxpayers.

The state argues that in its capacity of *parens patriae* it can regulate children when it might be unreasonable to apply such restraints to adults. This is true but there are constitutional limitations on the doctrine of *parens patriae*. Here, the state has substituted its judgment of the type of education for the judgment of the natural parent and has made no allowance for the religion of the child or the religion of the parent. The doctrine of *parens patriae* as applied to juvenile-court procedure has recently received a set back in *In Re Gault* (1967), 387 U.S. 1, 87 Sup. Ct. 1428, 18 L. Ed. 2d 527, where a child's right to counsel was held supreme over the benign protection of the state.

In the important matter of freedom of religion, the natural parents should have the right to rear their children in their religion, especially as here, where the parents are in agreement and the tenets of their religion require them to render such upbringing. When a child reaches the age of judgment, he can choose for himself his religion, but prior to that time the state in its capacity of *parens patriae* ought not to enforce educational requirements which will directly influence or destroy that choice. Nor is this harm to the Amish justified because on speculation some Amish children may after reaching adulthood leave their religion. To force a worldly education on all Amish children, the majority of whom do not want or need it, in order to confer a dubious benefit on the few who might later reject their religion is not a compelling interest.

The state relies on *Prince v. Commonwealth of Massachusetts* (1944), 321 U.S. 158, 64 Sup. Ct. 438, 88 L. Ed. 645, for its justification to regulate the affairs of children. But *Prince*, while involving a child labor law, was more concerned with public safety. In *Prince*, the defendant (a

Jehovah Witness) was convicted of allowing a 9-year-old child to sell religious magazines on a public street corner in the evening. While a religious claim was asserted and a weighing analysis made, the court found the public interest was compelling. This holding is not persuasive in this sensitive area where each case must be evaluated on its facts. Since the same court does not decide all the cases, there is bound to be a difference of opinion.

Thus in *Sherbert v. Verner, supra,* the court held a Seventh Day Adventist could not be denied unemployment compensation benefits by South Carolina because she refused to work on Saturday, her Sabbath. The purpose underlying the denial of unemployment compensation was not a compelling reason and did not justify the placement of a substantial burden upon a religious right. The purpose of the denial, *i. e.*, not to foster indolence, was not defeated by a religious exception. Furthermore, the legislation required, as in the instant case, an act forbidden by religion. Thus, the court found a constitutional exception for Sabbatarians from the South Carolina law. In *People v. Woody* (1964), 61 Cal. 2d 716, 394 Pac. 2d 813, the California supreme court made an exception for the use of a narcotic, peyote, which was used by the Native American Church in its ritualistic worship. The court considered the small use for a religious purpose not to be subversive of the underlying purpose of the narcotic laws to protect public health and the impact of the restriction on religion to be great.

Sherbert requires us to ask whether an exemption of the compulsory education law for the Amish would defeat the purpose of compulsory education. We think not. If the purpose of the law is to enable one to perform his public duties, then

there is precedent for an exception. The court in *In Re Jenison* (1963), 265 Minn. 96, 120 N.W. 2d 515, (1963) 375 U.S. 14, 84 Sup. Ct. 63, 11 L. Ed. 2d 39, (1963) 267 Minn. 136, 125 N.W. 2d 588, on remand from the United States Supreme Court for reconsideration in the light of *Sherbert,* found an exception from jury service for a person whose religion would not allow her to judge others. Here, the public duty of jury service, like the instant case, required an affirmative act contrary to religious conscience. The court found no great impact on the jury system by an exception. The exemption recognizing the religious interest was an accommodation to effectuate the guarantee of the Free Exercise Clause.

Likewise, in the flag-salute cases, *West Va. State Bd. of Edu. v. Barnette* (1943), 319 U.S. 624, 63 Sup. Ct. 1178, 87 L. Ed. 1628, an exemption was found to a requirement to perform an affirmative act which was contrary to religious belief but in fulfillment of the duties of a citizen. As in the jury case, no catastrophy would result from the exemption, nor would any great harm result to the person involved or to others from the exemption. The impact of such an exemption was slight on the underlying purposes and objectives of the state regulation to foster good citizenship.

We recognize where harm from the granting of an exemption will result either to the person involved or to others, and where the act required, although against religious beliefs, is passive in nature, some courts have found the state's interest to be paramount or compelling. Generally, such acts have not interfered directly with acts of sacramental worship or seriously with the exercise of one's faith. Thus, vaccination was required in *Cude v. State* (1964), 237 Ark. 926, 377 S.W. 2d 816, and the blood transfusions in *Application of the President & Directors of Georgetown College, Inc.* (C.A. D.C., 1964), 331 Fed. 2d 1000, *cert.* den. 377 U.S. 978. But

to the contrary, see *In Re Estate of Brooks* (1965), 32 Ill. 2d 361, 205 N.E. 2d 435. It is not claimed by the Amish that the government cannot reasonably regulate some acts religiously motivated, but they point out that compulsory education in its affect on the Amish religion is far more harmful than the effects of vaccination or a blood transfusion was on religion.

We think it is even less possible to assert a spurious claim for exemption under this case than under *Sherbert*. Claims for such an exemption can easily be detected because of the uniqueness of the Amish people. Nor is there merit in the state's argument that its administrative expense and inconvenience of an exemption should be avoided. Here, the state is put to no expense by the exemption. True, Green county may lose a few dollars in state aid but this amount can hardly be the basis of a compelling state interest.

Granting an exception from compulsory education to the Amish will do no more to the ultimate goal of education than to dent the symmetry of the design of enforcement. The right to the free exercise of one's religion under the First Amendment should be accorded as much protection as the other First Amendment guarantees of Free Speech and Freedom of the Press. In those cases the nature of the right is accorded great weight against governmental regulation. The right to worship your God or to practice your religious beliefs are as important as the right to speak or print freely and may, to the individual involved, be more important.

Establishment Clause.

In granting the exemption in *Sherbert* to the Seventh Day Adventist, the court stated its decision was not fostering

the establishment of the Seventh Day Adventist religion in South Carolina but "reflects nothing more than the governmental obligation of neutrality in the face of religious differences." This is the answer to the state's argument that to recognize an exemption for the Amish would violate the Establishment Clause. This case does not involve the Establishment Clause and the state misconceives the doctrines of neutrality and accommodation. Authorities now recognize the Free Exercise Clause and the Establishment Clause overlap, can conflict, and cannot always be squared on any strict theory of neutrality. *See Abington School Dist. v. Schempp, supra.* The "free exercise neutrality" may require a state to make special provisions for religious interests in order to relieve them from both direct and indirect burdens placed on the free exercise of religion by increased governmental regulations.*/ This principle of neutrality is exemplified by the *Sherbert, Woody,* and *Jenison Cases.* As was recently said in *Walz v. Tax Commission* (1970), 397 U.S. 664, 668, at p. 669, 90 Sup. Ct. 1409, 25 L. Ed. 2d 697, which held tax exemption of religious property was constitutional:

"The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is

---

*/ *See* Katz, *Freedom of Religion and State Neutrality,* 20 U. Chi. L. Rev. 426 (1953), and Religion and American Constitutions (1964); Kauper, *Prayer, Public Schools and the Supreme Court,* 61 Mich. L. Rev. 1031 (1963); Kauper, *Schempp and Sherbert: Studies in Neutrality and Accommodation,* 1963 Religion and The Public Order 3, 29 (1964). *See* also *Braumfeld v. Brown* (1961), 366 U.S. 599, 608, 81 Sup. Ct. 1144, 6 L. Ed. 2d 563, where the court said that statutory exemption for Sabbatarians from Sunday closing laws would be permissible.

this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." *See* also *Board of Education v. Allen* (1968), 392 U.S. 236, 88 Sup. Ct. 1923, 20 L. Ed. 2d 1060.

Other Cases Involving the Amish.

The three cases involving compulsory education and the Amish in other states have denied religious freedom but they are not controlling or persuasive. These are *State v. Hershberger* (1955), 103 Ohio App. 188, 144 N.E. 2d 693; *Commonwealth v. Beiler* (1951), 168 Pa. Super. 462, 79 Atl. 2d 134; and *State v. Garber* (1966), 197 Kan. 567, 419 Pac. 2d 896, *cert.* den. 389 U.S. 51, 88 Sup. Ct. 236, 17 L. Ed. 2d 50. Two of these cases, *Hershberger* and *Beiler*, were decided before *Sherbert* and rely heavily on the dubious distinction between religious belief and religious conduct. *See Cantwell v. Connecticutt* (1940), 310 U.S. 296, 60 Sup. Ct. 900, 84 L. Ed. 1213. Thus the court in *Hershberger* reasoned that requiring the Amish to provide an education for their children would not abridge their right to worship, concluding therefrom that no question of infringement of religious freedom was involved. In light of *Sherbert*, the validity of such reasoning is to be doubted since the guarantee of free exercise of religion covers more than sacramental acts of worship.

In *Beiler* the court gave recognition to the conflict between compulsory education and religious liberty but having drawn the balance, proceeded to mechanically add to the state's side a series of cases upholding a restriction on religious conduct.[9]/ No analysis in those cases was made of the relative importance of the religious beliefs in issue or of the degree to which enforcement of the law infringed upon those beliefs. Nor did the court consider the effectiveness of the regulatory purpose or the practicability of an exemption. The type of an analysis used does not satisfy today's standards in dealing with constitutional questions. It is also significant that the *Beiler* decision has been modified by the Pennsylvania legislature.[10]/

In *State v. Garber*, the Kansas court considering the problem after Sherbert, held that the law was to be enforced against the Amish. The appellants' contention that *Garber* reflects an insensitive consideration of the Amish religion is in part supported by a reading of the opinion. *Garber* followed the *Beiler* court's mechanical separation of religious conduct from religious belief, implying that the constitutional protection is afforded only to beliefs connected to the act of worship and held that since the compulsory

---

[9]/ *Reynolds v. United States* (1878), 98 U. S. 145, 25 L. Ed. 244 (polygamy); *Stansbury v. Marks* (1793), 2 Dall 213, 1 L. Ed. 353 (conviction of a person of the Jewish faith who refused to be judicially sworn on a Saturday); *Hamilton v. Regents* (1934), 293 U. S. 245, 55 Sup. Ct. 197, 79 L. Ed. 343 (military training at state university); and *Prince v. Com. of Mass., supra.*

[10]/ Note: 53 Va. L. Rev. (1967), 925, 951, describes the Pennsylvania plan which provides for the operation of day schools by church groups offering schoolwork programs to those fourteen and older who have completed the eighth grade. Each student spends no less than three hours a week in the "school" studying such subjects as English, mathematics, health and social studies, supplemented by outside agricultural and domestic projects. The note concludes "since perhaps the principle legitimate goal of compulsory education is to insure that children become useful and productive adults, and that they will not prove so dysfunctional as to become wards of the state," these "schools" ought to be as satisfactory as their trade school counterparts in urban communities.

attendance laws do not directly affect Amish worship, there was no abridgement of their religious freedom. But the Amish do not have a ritualistic form of worship. They have no churches as such. Their life style is dictated rather than motivated by their religion. The narrowness of the *Garber* concept of the scope of protection afforded by the Free Exercise Clause renders the case unpersuasive.

Garber has also lost luster because an exemption was provided in 1968 by the Kansas legislature. Kan. Stat. Annot., sec. 72-1111 (1968 Supp.). This exemption enables the Amish to comply with the Kansas law with its unique educational program. These legislative exemptions evince the fact the important goals of education can be attained by alternative forms of regulation without infringing first amendment rights.

We conclude that although education is a subject within the constitutional power of the state to regulate, there is not such a compelling state interest in two years' high school compulsory education as will justify the burden it places upon the appellants' free exercise of their religion. Therefore, the Wisconsin Compulsory School Attendance Law, sec. 118.15, Stats., is unconstitutional as applied to these Amish appellants, and the convictions must be reversed. If in the future the facts are such that the effectiveness of the compulsory education law will be seriously jeopardized by this exemption, we reserve the right to reexamine the question.

By the Court. — Judgments reversed.

State Nos. 92, 93, & 94

STATE OF WISCONSIN IN SUPREME COURT

State No. 92

State of Wisconsin,

Respondent,

v.

Jonas Yoder,

Appellant.

State No. 93

State of Wisconsin,

Respondent,

v.

Adin Yutzy,

Appellant.

State No. 94

State of Wisconsin,

Respondent,

v.

Wallace Miller,

Appellant.

HEFFERNAN, J. (dissenting) The principal opinion reaches an erroneous conclusion based upon questionable reasoning and a misstatement of the facts. Contrary to the implication of the opinion writer, the Amish were not prosecuted for failing to send their children to a public high school. They were prosecuted for violation of sec. 118.15 (1), Stats., which requires attendance at school, whether public or *private*, until the end of the school period in which the child attains sixteen years of age. The distinction is important and is crucial to this dissent. The principal opinion rests in part upon the misconception that the defendants' only alternative to criminality is *public* school attendance for their children. Such is not the case. The law makes no such requirement.

The reasoning is faulty, for it conceives the problem as one of religious liberty alone. It completely ignores the personal liberty of the Amish children to avail themselves of educational opportunities beyond eighth grade. In addition, the freedom of these young people to make a religious choice is completely ignored.

That opinion states:

> "Since the children are not being sued as truants, we do not reach the question of whether they have an independent right of the free exercise of *their* religion to be protected here. We view this case as involving solely a parent's right of religious freedom to bring up his children as he believes God dictates." (Emphasis supplied.)

This, of course, is the easy way out. It keeps intact the opinion's oversimplification of the problem and avoids completely the difficult question of the court's responsibility to see that the legislative mandate of universal education is carried out. It purports to strike a blow for religious liberty; but in so doing, it does little for religion and impinges upon personal liberty.

The principal opinion solves the balancing of religious interests with equal ease. Having once set up the postulate that the free exercise of religion cannot be impinged upon by the state unless there is a compelling state interest in the regulation, the syllogism is completed by the unsupported assertion that "compulsory education . . . is not a compelling interest although it is within the state power to regulate."

That assertion is contrary to a reasonable view of accepted law. *Brown v. Board of Education* (1954), 347 U.S. 483, 74 Sup. Ct. 686, 98 L. Ed. 873, stated:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."

What could be a more compelling state interest than "the most important function of state and local governments."

The very organic act that first set up a political structure for the territory that is now Wisconsin emphasized the compelling public interest in education. Article III, Northwest Ordinance 1787, provided:

> "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education should be forever encouraged." Wis. Stats. Anno., Vol. 1, p. 740.

Subsequent amendments to the Ordinance provided that the proceeds of public lands were to be used for seminaries of learning. The enabling act under which Congress authorized the organization of this state directed that section 16 of every township should be granted to the state for school purposes.

Education has been a prime and compelling interest of this state since its very beginning.

This, of course, does not completely answer the question of whether the compelling interest of the state should be paramount to the obviously sincere belief of the Amish elders that school attendance ought not be compelled beyond a grade-school level. On one hand we find a legislative mandate of unquestionable compelling state interest — that all children attend school until the age of sixteen — and, on the other, a constitutional mandate that there shall be no state law that prohibits the free exercise of religion.

A court ought not to make a choice favoring either the particular interest of church or state unless an irreconcilable conflict exists. Thomas Jefferson could not foresee that such conflicts could ever exist. He stated in his reply to an address of the Danbury Baptist Association in reference to the recently proposed freedom of religion amendment to the Constitution:

> "Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties." *Reynolds v. United States*, 98 U.S. 164.

While Jefferson's words express a hope rather than a realization, the lesson is clear: Conflicts between church and state, *i.e.*, between man's natural right of religious choice and his duty to his organized society, ought to be reconciled where possible, and judicial fiats declaring legislative enactments unconstitutional ought to be avoided except in the

clearest of cases and where all reasonable alternatives have been exhausted.

The principal opinion would also hold that the state has no compelling interest in a regulatory measure unless it has a "need to apply the regulation without exception to attain the purposes and objectives of the legislation." The argument, therefore, seems to be that to grant an exemption for such a small group as the Wisconsin Amish would have no effect upon the general policy of the state to further education, and the diminution of Amish children's education by two years is so insignificant as to be *de minimis.*

This argument misconceives the nature of the state's compelling interest in education. The purpose of education is not alone to provide a mass of educated, and hence, taxable citizens, but is, in addition, intended to educate the individual for life. The government's concern is not with enforcing a regulatory scheme. Rather, the concern is based upon the precepts stated in the Northwest Ordinance, *supra,* that religion, morality, good government, and happiness are all dependent upon education. This is the compelling government interest.

This difficult problem cannot be dismissed as *de minimis.*

The state's interest and obligation runs to each and every child in the state. In the context of the public law of the state, no child's education is below the concern of the law. The principal opinion bolsters the *de minimis* argument by making the unsupported tacit assumption that all or most of the Amish children will forever remain in their communities. This is not necessarily a fact. Large numbers of young people voluntarily leave the Amish community each year and are thereafter forced to make their way in the world.

Those young Amish who leave the group have received no education that equips them for modern American life. By not enforcing the school attendance law, the State of Wisconsin has consigned these young people to a future without any choice or goal except those of the traditional Amish life. They are abandoned without the intellectual tools to survive should they elect to leave the Amish way of life.

The traditional Amish life has its attractions, but ought this court, be depriving Amish children of all but a bare eighth grade education, block for all time all other avenues for them. This is the effect of this decision. On the basis of the religious beliefs of their parents, the Amish children are without a hearing[1] consigned to a life of ignorance—blissful as it may seem to the author of the principal opinion, who apparently views the Amish as "the noble savage," uncorrupted by the world. The reader is left with a picture of idyllic agrarianism. Unmentioned is the tragic side of Amish life: "Drinking . . . has become problematic" (Hostetler, *Amish Society*, p. 282); "Rowdyism and stress" (p. 281); "Preoccupation with filthy stories" (p. 282); "Drinking is common in all large Amish settlements" (p. 283); "It would appear that among the Amish the rate of suicide is just as high, if not higher, than for the nation." It is highest among young men (p. 300). Amish society is perhaps but another microcosm of society—some of it is good and some bad. It is a cross-section of good and evil influences that pervade any society. But the children's denial of education ought not be justified on the mythological basis assumed by the principal opinion.

---

[1] With our ostensible solicitude for the fate of children who are in other legal situations affected by conduct of their parents, it is surprising that no guardian ad litem was appointed to represent these children's interest. While the religious beliefs of the parents are at stake in this lawsuit, it is apparent that the children's interest is of equal importance. Reason dictates that representation by a guardian ad litem was a *sine qua non* of the majority's result.

The above descriptions apply to Amish society generally and are not specifically descriptive of the Amish community involved in this case. The source, Hostetler, *Amish Society,* is the one relied upon by the majority.

It is apparent, however, that the problem of having these "peculiar people"[2/] in our society ought not be solved by fining them or sending them to jail if they choose not to conform to the usual religious mores of the state. While the record in this case is incomplete, it reveals a complete lack of any attempt by local or state officials to deal realistically or imaginatively with a difficult problem. In fact, there is strong evidence that the purpose of this prosecution was not to further the compelling interest of the state in education, but rather the reprehensible objective, under the facts of this case, to force the Amish into the school only for the purpose of qualifying for augmented state aids.

The points of view, however, are clearly reconcilable. The law requires that all children attend school until they are sixteen. The Amish object to the worldiness of the usual high school. The writer of this dissent believes that both objections can be met by an Amish vocational school which will teach reading, agriculture, and husbandry, and whatever religious precepts the Amish community desires.

In addition, such basic skills as English and mathematics should be taught—"unpretentious" knowledge that will be useful not only in the Amish community, but would better enable those who fall away from the community to adjust to the outside world and to continue their education if they so desire.

[2/] Deuteronomy, ch. 26, verse 18; Titus, ch. 2, verse 14.

Such plans have been adopted in Pennsylvania, Ohio, and Iowa, usually only after gestapo tactics by school authorities outraged the non-Amish community into reaching reasonable alternatives. In Iowa, only the intervention of Governor Harold Hughes brought rationality and compassion to a reconciliation of the problem. The Pennsylvania plan offers schoolwork programs to Amish fourteen years or older who have completed eighth grade. In addition to classwork in English, mathematics, and hygiene, they are required to develop domestic and agricultural skills. In Iowa, schooling is required, but Amish schools need not meet the public school curriculum standards. A similar practice is followed in Maryland. In Indiana, Amish are encouraged by the state superintendent of schools to organize their own schools.

Hostetler[1]/ points out that the enforcement of school attendance laws has resulted in the "professionalization" of Amish schools and that, as a consequence, nearly 200 Amish elementary schools and 50 Amish vocational schools (for post-fourteen-year-old students) were in operation in 1967. The plans recognize that Amish children will be better suited for the Amish way of life if they are educated to be productive members of the Amish community. They also recognize the state's interest in education that will serve the children if they leave the community.

1/ This discussion of these alternatives relies largely on Hostetler, *supra*, pp. 193-203.

The alternatives, therefore, are not those that are posed in the principal opinion. Compulsory education until age sixteen is not necessarily "worldly" education. No part of our law requires a student to go to a school not of his own religious choice. It merely requires that he go to a school. There is no reason why the Amish community should not establish its own school—as the Amish have in other states—that will foster the Amish way of life. They may not, however, ignore the compelling interest of the state in educating their children. They may do as other religious organizations have done and establish their own schools and teach them basic skills and the precepts of their own religious beliefs and be in conformance with the law. Until they do so, they are subject to criminal penalties.

Neither the prosecutorial tactics of the school authorities nor the insensitivity of the principal opinion to the educational policies of the state and the personal liberties of these children are appropriate to the problem faced by the Amish.

Contrary to the conclusions of the opinion subscribed to by the majority of the court and authored by Mr. Justice Connor T. Hansen, I am satisfied that the state's compelling interest in universal education has been abundantly demonstrated.

I would affirm, but would stay execution of sentence for such period of time as is reasonably required to properly organize and to commence operation of an Amish vocational school. At the commencement of such operations, the judgment should be vacated and the complaint dismissed.

State Nos. 92, 93 & 94

August Term, 1970

STATE OF WISCONSIN IN SUPREME COURT

State No. 92
STATE OF WISCONSIN,
Respondent,

v.

JONAS YODER,
Appellant.

State No. 93
STATE OF WISCONSIN,
Respondent,

v.

ADIN YUTZY,
Appellant.

State No. 94
STATE OF WISCONSIN,
Respondent,

v.

WALLACE MILLER,
Appellant.

CONNOR T. HANSEN, J. *(Concurring.)* I concur with the result reached in the opinion written by Mr. Chief Justice HALLOWS, but only to the extent that children of members of the Old Order Amish religion or Conservative Amish

Mennonite Church, living as members of the Amish community, should not be required to attend a school which meets the requirements of state law beyond the eighth grade.

Under the facts of this case, there has been an inadequate showing that the state's interest in establishing and maintaining an educational system overrides the defendants' right to the free exercise of their religion. Consequently, I would hold that unless and until further experience indicates that so invoking the First Amendment poses a serious threat to the effective functioning of an educational system within the state, children of members of the religious order involved in this case should not be required to attend school beyond the eighth grade.

I am authorized to state that Mr. Justices WILKIE, BEILFUSS, HANLEY and R. W. HANSEN, join in this concurring opinion.

MEMORANDUM DECISION BY COUNTY COURT
(Formal Parts Omitted)

Trial to the Court held April 2, 1969, Judge Roger L. Elmer, presiding.

Present in court were: Mr. L. A. Koenig, District Attorney for Green County, Mr. Robert D. Martinson, Deputy Attorney General of Wisconsin, and Max Ashwell, Attorney for the Wisconsin Department of Education; Defendants, Wallace Miller and Jonas Yoder, with their attorneys, Mr. William B. Ball and Mr. Thomas C. Eckerle. The appearance of Defendant, Adin Yutzy, was excused without objection under Section 957.07, Wisconsin Statutes, with authorization by him for representation by attorney.

It was agreed the cases should be tried and considered together.

Oral argument was had June 13, after receipt of briefs (except for one supplementary case discussion by letter by Defendants received with State's consent, June 23, 1969).

MOTIONS

At the opening of the trial, Defendants moved for dismissal of the complaints in all actions on the grounds of unconstitutionality of Wisconsin Compulsory School Attendance Laws.

The Court took the motion under advisement, reserving a ruling to be made after trial and arguments in the case.

Another motion was made during trial for Non-Suit, made by Defendants on the ground of the State's failure to prove mental and physical ability to go to school. A ruling on this was also reserved. It is the opinion of the Court that the evidence presented by the State, along with the permissible weight of circumstantial evidence, and the status of these facts as peculiarly within defendant's knowledge, did meet the required burden of proof. The motion is denied.

COMPLAINTS

Defendants were each charged as parents with failure to cause child to attend school regularly, contrary to Section 118.15 of the Wisconsin Statutes.

FACTS

It is found that the following were the facts, uncontroverted by Defendants.

At the times and places charged in the complaints, the named children were between the ages of 7 and 16 years; that they were not attending a high school, or vocational school, technical school, or private school, or any school. That each Defendant was a parent of one of the children, and each concurred in his child's non-attendance, and made the decision that such child should not attend school.

Wisconsin Statutes 118.15 (1) provides:

> "Unless the child has a legal excuse, any person having under his control a child between the ages of 7 and 16 years shall cause such children to attend school regularly, during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in session, to the end of the school term, quarter or semester of the school year in which he becomes 16 years of age."

Subsection 3 of the same Statutes excepts any child who is not in proper physical or mental condition to attend school, and any child exempted for good cause by the school board of his district of residence, and any child who has completed the full 4-year high school course. The certificate of a reputable physician in general practice is acceptable as proof that a child is unable to attend school.

The Court has experienced some concern about the specific provisions of certain of the Wisconsin school laws. Subsection (2) of Section 118.15 (aforesaid) provides for a different compulsory "high school" attendance age for some children (until the end of the school term, quarter or semester in which he becomes 18 years of age, unless, with proper approvals, he attends (after 16 years of age) the vocational, technical and adult education school in the district in lieu of high school). This applies to children residing in a school

district which also contains within its boundaries a vocational, technical and adult education school, offering day class programs. Thus different ages apply to compulsory attendance in different school districts.

Section 118.145 provides for determination of minimum standards for admission to high school, indicating the possibility of real potential dilemma.

However, no issue was raised in regard to these or other possible statutory ambiguities, nor was Subsection 2 above specifically applicable in the case, and the same will be no further considered.

CONSTITUTIONALITY OF WISCONSIN COMPULSORY SCHOOL ATTENDANCE LAWS AS TO DEFENDANTS

The principal issue on which Defendants base their defense is their contention of unconstitutionality of Wisconsin compusory school attendance laws as applied to Defendants as members of "Old Order Amish". As established by the evidence in these cases, Defendants have, as a substantial factor in their religious belief, a strong conviction that they cannot send their children to high school or any school of academic or secular learning after the children have completed the basic equivalent of an 8th grade education. They feel so strongly in this respect that they are convinced that not only do they jeopardize their own relationships with God, but also those of their children, if they permit such attendance.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment 1: Free Exercise of Religion

Amendment XIV: Due Process of Law

Wisconsin Constitution

Article I, Section 1: Inherent Rights of Man

Article I, Section 18: Freedom of Religion and Conscience

The provisions of both the Federal and State Constitutions provide for the protection of religious freedom.

The United States Constitution provides in the First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

The Wisconsin Constitution, Article I, Section 18, states:

"The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any ministry, against his consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishment or modes of worship, nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries."

Both Constitutions contain also provisions as to the rights and liberties of any individual. The United States provides by the Fourteenth Amendment that no state shall deprive any person of life, liberty or property without due process of law. Wisconsin declares (Art. I, Sec. 1) that all men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness.

POSITION OF DEFENDANTS

Defendants contend that all the Defendants (parents), and each of the children named in the complaints, are members of the Old Order Amish religious society and/or sect; that the religious beliefs and practices of such sect are certain and matters of profound commitment, and include the religious duty, enjoined on parents by their religion, to rear their children in that faith; that they (Defendants) would be unable to carry out this duty by the application of Wisconsin compulsory school attendance laws to them.

They further contend that their children would be placed in a school providing an environment hostile to and conflicting with the Old Order Amish religion's way of life, and that they would be removed from their own religious environment which is central in their lives.

It is also their position that academic study itself is harmful if beyond 8th grade level, and refuse to consider establishing their own parochial or full-time private school.

The direct testimony of Professor John Hostettler at the hearing appears to describe the Old Order Amish society and religious beliefs with substantial clarity and inclusiveness. (Transcript of Trial, pages 45-55)

APPLICABLE LAW — RELEVANT PRIOR DECISIONS

The Federal Constitution is obviously controlling relative to the issue of religious freedom. *Cantwell et al. v. State of Connecticut,* 310 U. S. 296; 60 S. Ct. 900.

There appear to have been decisions by State appellate courts in cases containing similar issues, but no such case is found to have been determined by the Wisconsin Supreme Court.

The United States Supreme Court has not decided the specific questions involved here. There has been a large number of cases with various other claims involving the issue of religious freedom. Some of them are referred to.

FEDERAL DECISIONS

Prince v. Massachusetts, 321 U. S. 158; 64 S. Ct. 438 (1944), involved the affirmation of a Massachusetts conviction for the violation of the Massachusetts child labor laws by Mrs. Prince in permitting a child (girl, aged 9) to sell and distribute religious periodicals on the streets. The defendant claimed the prohibiting statute abridged her freedom of religion. The court acknowledged that the custody, care and nuture of a child resides first in the parents, whose primary function and freedom include preparation of their children for obligations the State cannot supply.

The freedom of parents to bring up the child in "the way he should go", teaching him the tenets and practices of their faith, and the freedom of the child to "preach the gospel" and by public distribution of "Watchtower" and "Consolation" in conformity with the scripture: "A little child shall lead them", were the liberties which Mrs. Prince claimed. (The little girl had offered testimony to show that she believed it her religious duty to perform this work, and failure would bring condemnation to everlasting destruction at Armageddon but the introduction of this testimony to the record was disallowed at the trials.)

The court pointed out that to make accommodation between one's freedoms and the exercise of state authority "always is delicate". It held that the family is not beyond regulation in the public interest as against a claim of religious liberty, and that neither the rights of religiously motivated acts nor the rights of parenthood are completely beyond limitations. Further, it was affirmed that matters which may be permissible for adults may not be so for children, even with their parents' presence. The interest of the State in the protection of health and safety are not nullified simply because it is challenged on the grounds of religious freedom.

Meyer v. State of Nebraska, (1923) 43 S. Ct. 625; 262 U.S. 390. Plaintiff in this case was convicted in Nebraska for, as a teacher in a parochial school, teaching the German language to a child of 10, contrary to a Nebraska law forbidding teaching any subject other than English to any pupil who had not attained and passed the eighth grade.

The U. S. court reversed the conviction, holding that the liberty protected by the 14th Amendment may not be interfered with by the State by arbitrary legislative action, or without reasonable relation to a purpose within its competency to act; that the determination by the Legislature of what constitutes a proper exercise of police power is not final or conclusive.

Pierce v. Society of Sisters of the Holy Names of Jesus & Mary, 45 S. Ct. 571, 268 U. S. 510.

This case established the principle that the State cannot compel a parent to send his child to public school.

The State of Oregon's compulsory school act of 1922 required all normal children between ages of 8 and 16 to attend public school. The court held it to be in violation of the Constitution (14th Amendment) because it deprived parents and children of their rights in the selection of schools.

However, the court indicated no question to have been raised as to the power of the State to regulate all schools, supervise and inspect them, to require all children of proper age to attend some school, to require that certain studies plainly essential to good citizenship must be taught, etc.

West Virginia State Board of Education v. Barnette, 63 S. Ct. 1178, 319 U. S. 624 (1943).

In a previous case, *Minersville School District v. Gobitis,* 60 S. Ct. 1010, 310 U. S. 586, 127 ALR 1493 (1940) the court had "assumed" that the State had power to impose the "flag salute discipline" on all children in general.

But the *Barnette* case re-examines its assumption, discussing it with Lincoln's statement of the dilemma, (63 S. Ct. at page 1184)

> "Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence?"

The court determined that the compulsory salute enforcement should be enjoined.

Involved were requests for injunctions against the School Board applying the requirement for the flag salute against Jehovah's Witnesses. The Witnesses, an incorporated body, whose teaching that the obligation imposed by the law of God is superior to that of the laws enacted by temporal government, includes a literal interpretation of Exodus, Chapter 20,

verses 4 and 5, which says: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them or serve them." The flag is considered an image under this command and for this reason they refused to salute it. (See 63 S. Ct., page 1181.)

The court recognized that the symbolism of the flag could include many things to different individuals; symbols of salute often convey political ideas just as religious symbols such as the Cross, the Crucifix, the altar and shrine or clerical raiment convey theological ones. And associated with many of the symbols are appropriate gestures of acceptance or respect, whether a salute, a bowed or bared head, a bended knee.

The purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of the political controversy.

However, though enjoining the salute, the court reaffirmed the statement of the right of the State to:

> "require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country." (63 S. Ct., page 1182)

(The court also refers in Footnote 13 page 1183 to an interesting comparative situation:

> "Early Christians were frequently persecuted for their refusal to participate in ceremonies before the statue of the emperor or other symbol of imperial authority. The story of William Tell's sentence to shoot an apple off his son's head for refusal to salute a bailiff's hat is an ancient one. . . ." 21 Encyclopaedia Britannica, 14th Ed. 911, 912.)

Sherbert v. Werner, 83 S. Ct. 1790, 374 U. S. 398 (1963), In this case a Seventh Day Adventist had asked for unemployment compensation but had been denied it by South Carolina. Denial was based on her failure to accept available employment which included the requirement of Saturday work. She contended that her religion forbade her to work on Saturday. The South Carolina Supreme Court held that such denial was not a violation of her religious rights.

The United States Supreme Court reversed, holding that the denial of the unemployment benefits restricted her free rights of religion.

> "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' " Brief of Defendants, page 9.

School District of Abington Township v. Schempp, 83 A. S. Ct. 1560, 374 U. S. 203 (1963).

This case involved a requirement by Pennsylvania of the reading of at least 10 verses of the Holy Bible, without comment, at the opening of each public school on each school day. Any child could be excused from attending such reading, or participating therein, on written request of his parent or guardian.

This case involved the "Establishment" clause of the constitution. The court held that the State, in the relationship between man and religion, is firmly committed to a position of neutrality.

Murdoch v. Commonwealth of Pennsylvania, 63 S. Ct. 870; 319 U. S. 105.

Here the court held that spreading one's religious views through distribution of literature, door to door, and playing a phonograph record expounding their views was an exercise of religious freedom rather than a commercial venture, and a city ordinance providing that canvassing required a license was unconstitutional to defendants (Jehovah's Witnesses).

Reynolds v. United States, 98 U. S. 145, and *Davis v. Beason*, 133 U. S. 333, 10 S. Ct. 299, are cited in the above case relative to the polygamy and bigamy holdings, one of the areas of illegal conduct under claim of religious freedom which has been definitely disavowed.

Defendants also refer to other Federal cases involving the use of L. S. D., poisonous snakes. (Defendants' Brief, page 26)

STATE DECISIONS

The State (Prosecution) cites, as a very parallel case, *Kansas v. LeRoy Garber*, 197 Kan. 567, 419 Pac. 896, 2d Series.

Defendant, Mr. Garber, was found guilty of violating the compulsory school attendance law of Kansas. His daughter did not attend any school wherein school consisted of 4 weeks of 5 days and of 6 hours per day, as required. The case was submitted on a stipulation of facts. Included where these facts: Defendant was a member of the Old Order Amish Mennonite Church. His daughter, under defendant's control and of the compulsory school age was not enrolled in any public school in her district. She was enrolled in an approved correspondence school of home study (vocational culture school).

In 1965, the Amish community in Reno County, Kansas, established a school for its children known as the Harmony School. Its pupils were limited to those who had finished eighth grade but under 16 years of age. It was taught by an Amish farmer whose formal education had consisted of 8 grades in public schools. Formal classes were held in Harmony School one morning each week. On each of the remaining four days students spent one hour in study at home and five hours in vocational home training, generally in farming. All instruction was given in English except a German reading course in which the German Bible was used.

Defendant's daughter enrolled in Harmony School after notice of truancy was served on defendant.

The agreed statement of facts also contained a history of the Amish people and a recital of their religious tenets and practices. Many of the stipulated facts were very similar to the proof submitted at the trial in our case.

The court upheld conviction of defendant, holding that neither the correspondence school nor Harmony school constituted a private, denominational or parochial school. Among other things, it did not meet the days and hours in school requirement. Here too, the defendant argued infringement on religious freedom. However, the Kansas Court held that religious freedom does not place the parent beyond regulation by the State in its providing and requiring education for the public interest as against a claim of religious liberty.

In *Commonwealth v. Beiler,* 168 Pa. Super. 462, 79 A. 2d 134, there was affirmed a conviction under the Pennsylvania compultory school law. In this case, too, the court accepted as true definitions of faith the Amish prohibitions against having their children attend high school. Nevertheless, it was held that parents have no constitutional right to deprive

their children of education or to prevent the State from assuring children adequate preparation for independent, intelligent exercise of their privileges and obligations as citizens in free democracy.

In *People of the State of Illinois v. Marjorie Levison, et al.*, 404 Ill. 574, 90 N. E. 2d 213, although involving different precepts, Illinois stated that:

> "No parent can be said to have a right to deprive his child of educational advantages at least commensurate with the standards prescribed for public schools, and failure to provide such benefits is a matter of great concern to the courts."

The Illinois Court approved, in effect, home education by private home instruction by the parents in this case. The father was a college graduate and minister; the mother had two years of college and some training in educational psychology. Regular school hours and subjects were observed in the home teaching.

State v. Hershberger, (Ohio, 1955) 144 N. E. 2d 693.

Defendant, a member of Old Order Amish Mennonite Church, sent his children to a private school established by members of his faith. This school was held in a one-room frame building, taught by a teacher with less than an 8th grade education.

The school involved was held not to qualify. A private school must provide instruction equivalent to that of public school. It was held that no question of religious freedom was presented in the case; to require defendant to provide for the proper education of his children did not abridge his right to worship according to his conscience. His right to instruct his children in his chosen faith was not questioned.

Dealing in another area of parental constitutional rights of worship, the case of *State of New Jersey v. Perricone*, 37 N. J. 463, 181 A. 2d 751 (1962) the New Jersey Court held that the compelling needs of an infant, child of parents who were Jehovah's Witnesses, for a blood transfusion which by their faith they strongly opposed, were paramount.

CONCLUSIONS

It serves no purpose to comment extensively on the historical patterns of problems of persecution which have traditionally beset minority groups, whether minority religious faiths or other minorities.

Man's lack of empathy and perspective, with its resultant self-righteous intolerances and repressions directed toward minority religions have not added lustre to his composite human stature.

One of the principal motivations of the early settlers of our nation was their search for escape from the religious persecution of their various prior environments.

The framers of our Constitutions determined that Church and State must be separate, that man must be absolutely free to believe as his conscience might direct him, and free to act in accordance with his beliefs, so long as he did not interfere with the rights of others or create a real danger to society.

The State should know no heresy. It should condone no New Salem Witch trials.

Our courts have recognized the threats to the freedom of the individual by the expressions of convictions of the power of majority groups whose power has been generated by their strength of numbers.

The area, and that which is involved in our case, of close questions of conflicts between the individual's constitutional religious freedom and personal rights, when they are in conflict with the rights of the State to carry out its normally proper and reasonable governmental functions and police powers, presents unique difficulties, and problems of narrowly separated degrees. The Federal Court has emphasized its recognition of the grave responsibility when it must reconcile these conflicts. The "judicial conscience" is put to its severest test. Every possible "leeway" should be given to the claims of religious faith. (See Footnotes, 18, 16 *Am. Jur. 2d*, page 655)

However,

> "The freedom of religion which is guaranteed by Federal and State constitutions is not an unlimited freedom. To affirm that the freedom to follow conscience has no limits in the life of a society would deny that very plurality of principles which, as a matter of history, underlies protection of religious toleration." (Supra)

Defendants are sincere in their religious convictions. They feel that any education of a secular nature, past eighth grade, absolutely obstructs their compliance with the commands of God and destroys their communal family life. The nature of their basic society and pattern of life is interwoven with what they believe is their compelling obligation to preclude their children from substantial exposure to non-Amish ways and thinking. The basic elementary education which they accept is adequate (perhaps marginally) for their required needs in their methods of farming or carpentry. (See testimony of Professor Donald Erickson, Record, pages 94-117.)

Professor Erickson, a professional student of education, indicated strong convictions that our educational system is

too standardized; that no school of which he is aware is culturally and religiously neutral; that the uniformity of school patterns is aimed at equipping a child to function in a stereotyped pattern; that one single system of education imposed upon everybody is "disastrous" and "harmful to the general welfare"; that the education furnished by the Amish is beneficial to their children and consistent with the maintenance of a solid culture, a whole and complete way of life; that the success of this system is verified by the excellent functioning of the Amish community, its freedom from crime, delinquency, public assistance and general symptoms of social failure.

The Amish are, of course, legally free to create their own parochial high schools just as other religious groups have done, if they will comply with minimum academic educational standards.

Apparently they refuse, in accordance with their belief, to do this, even though their children could thus retain their "isolation" and would not be forced to receive their education in an environment of "unbelievers". The consequent separation of their children from their home environment and deprivation of training by parental observation, along with their objection to academic learning, leads them to refuse this alternative.

And, as all other persons and religions, the Amish are in no way prevented by law from providing as much religious training in the home or in their community as they find proper.

It is understandable that the Amish, just as any other group, hope to retain their children in their religion, and to avoid, as much as possible, exposure to non-conforming influences which might be negatively influential to their steadfastness.

This is obviously one of the motivations of other religious groups in creating their parochial and private schools, by which they can control a substantial part of their childrens' influential environment, as well as their teachings, during their formative years.

The members of every religious group have the right to use all reasonable affirmative motivations of which they can avail themselves in their goal of keeping their children steadfast in their own faiths.

It is also understandable that the Amish, with their culture, are concerned with their disappointments with the "world".

But surely many concerned parents of many faiths and convictions express alarm at many of the exposures offered by today's environment to its youth. The high odds of exposure to primitive, jungle type of savagery on the streets of many of our metropolitan areas, simply as a result of being there, appear to cause apprehension for many parents who make observations from hearing or reading the news media.

The commentaries of many of our nation's observers, decrying the emphasis on what to many appears to be an environment singularly satiated with pornography for profit, aggressively promoted by those who gain with apparent confidence of freedom from any circumscription, books whose covers are blatantly designed to shout attention to the extremities of concupiscent promise enfolded within; movies considered by some of their seasoned evaluators to be competitively and cynically engineered toward qualification for their Adult ratings; emphasis of the appeal to the Hedonistic in many forms of commercial advertising, these and other stimuli with which children are confronted in their introduction to what to many appear to have become the new norms, whether

or not these children are of sufficient maturity to have achieved their own perspective, these can give grief to parents and to non-parents.

Nevertheless, the concomitant issue, which cannot be separated from the measure of the rights of the Amish parents, is the equated effect of the exercise of their rights on to the rights of these same children. They are not only their children but also individuals congenitally entitled to their own freedom, each in his own right, each born under the protection of the same constitutional promises.

Does the right to affirmative teaching and guidance carry with it directly or by implication the right to the free and unlimited utilization of the negative methods of denial of the right to acquire acquaintance with other areas of learning? Does each youth possess the "equal" right to search for his personal determination of his own convictions with the benefit of the perspective gained from the comparisons and contrasts intrinsic in academic learning?

This privilege has been considered by our society to be a basic right of all of its children, and the compulsory school laws are the means of articulation of that right.

The record does not substantiate that substantially all children from the Amish groups determine to remain in that culture.

It does appear from the record that an appreciable number of Amish-reared youth may decide to subsequently adopt a different faith, join a different church, or leave the Amish community to become a part of a different culture. They then must compete with those who have had a high school education.

Do these individuals not have the right to have at least the degree of educational preparation offered by high school, in

case they may decide to become veterinarians, physicians, sailors, "specialty" farmers, heavy equipment operators, yes, perhaps a college professor or professional expert in education and anthropology, authors?

The record in this case does not contain extensive testimony on this point. However, Professor Hostetler, a defense witness, in discussing Old Order Amish population on cross-examination, said:

Q This goes back to the Old-Order Amish, do your studies indicate whether the Old-Order Amish population is the same as it was fifty years ago, or more or less?

A Two things on that, the population is much more than it was fifty years ago, there is a gradual increase, but at the same time the Amish have also lost members in their church through the years, and I would say of the total migration to the country, probably two-thirds have been assimilated non-Amish people today.

Q So the Amish religious membership is not known?

A No, it is non-static.

Q Specifically, I take it, it is not true that once a member of the Amish always a member of the Amish, not in all cases anyway?

A Since the baptismal vow is taken as an adult it is always a problem that one might choose not to be an Amish when you reach that age, yes.

(Trial Record, pages 68 and 69)

It is not the wish of this court to maximize the distinction between Amish parents and Amish youth. Both are members of the Amish Community and many of the youth will become Amish parents. Nor does it wish to overemphasize the negative arguments relative to the contentions of the Amish

parents. And the court is not unaware of what, to some, may seem the clouded and perhaps anomalous shadows of similarity in some aspects of this conflict of rights and the conflicts of rights partially causative of the environmental factors of general parental concern previously alluded to in this opinion.

This extended opinion is the attempt, within the limitations of its writer, at an expression of their recognition in the attempt toward reconciliation of the complexity of factors, pressing in opposing directions the essential search for a just determination of the questions which have been presented to this court.

And the court is further confronted by another admonition of our law. It is an established and long-standing rule of our law that the exercise of the power to declare legislation unconstitutional by trial courts (courts inferior to the Appellate Court) "should be carefully limited and avoided if possible." *State v. Stehlek*, 262 Wis. 642, 56 N. W. (2) 514.

> "The authorities are to the effect that unless it appears clearly beyond a reasonable doubt that the statute is unconstitutional, it is considered better practice for the court to assume the statute is constitutional, until the contrary is decided by a court of appellate jurisdiction. That is especially true where, as in this case, the statute has been in effect for nearly eight years, and has been enforced in innumerable cases." Ibid, pages 645, 646. (But see dissent in *Prince v. Mass.* Ibid.)

In *In re City of Beloit*, 37 Wis. 2d 637, 155 N. W. (2) 633, the court said, at page 643:

> ". . . and (2) if a statute is open to more than one reasonable construction the construction which will accomplish the legislative purpose and avoid unconstitutionality must be adopted."

The Court finds that the Wisconsin compulsory school law does interfere with the freedom of the Defendants to act in accordance with their sincere religious belief, but also concludes that the statute in issue represents a reasonable and constitutional exercise of the governmental function of the State.

The Court would be inclined to find unconstitutionality of such statute if its requirements to attend school effected and concerned only adult members of the Old Order Amish. However, in view of the innate conflict with the rights of the Amish youth whose attendance it does require, as well as the basic interest and duty of the State in regard to the education of its children, it does not find the statute unconstitutional in its application to Defendants.

The Defendants' motion to dismiss the charges as involving an unconstitutional statute is denied.

The Defendants, each of them, is found guilty as charged.

PENALTY

No one involved in this proceeding has questioned the sincerity of the Defendants in their conviction that they were violating no constitutional law.

No one has questioned the exceptional morality of these Defendants as Amish people, their history in relation to their admirable record of lawful conduct in areas other than school laws.

The prosecution has not taken a vindictive approach; it has not indicated that it wishes to treat Defendants in the usual sense as alleged "criminals". On the contrary, it has shown great respect for the Defendants, their society and their sincerity of belief.

However, it is one of the realities of the law here involved that to enforce what the Legislature has determined to be a proper statute for carrying out its duties to all Wisconsin youth it has logically found it necessary to determine non-compliance to be a misdemeanor and provide for a penalty in conviction thereof.

Regrettully, this court feels that, in order to fulfill its function, under the circumstances it must impose at least a symbolic penalty upon this conviction.

It is the Judgment of the Court that the Defendants, each of them, is fined the sum of $5.00. Costs shall be waived.

DATED: August 15, 1969.

BY THE COURT:

Roger L. Elmer
Roger L. Elmer
Green County Judge

ADDENDA

The Court wishes to express its appreciation and commendation to all counsel involved, both those for the State and those for the Defendants, for the laudable and professional approach taken to the case, its trial and argument, and all proceedings herein.

MEMORANDUM DECISION BY CIRCUIT COURT
(Formal Parts Omitted)

Hearing upon appeal for trial de novo to the Circuit Court from the judgment of the County Court of Green County, pursuant to Section 958.075, Wis. Stats., heard at the Courthouse

in the City of Monroe, and submitted upon the stipulated record made in County Court, together with the original briefs and additional argument of counsel in all three cases as consolidated for trial.

Present and Presiding:

Hon. Arthur L. Luebke, Circuit Judge;

Appearances:

Mr. Louis Koenig, District Attorney for Green County on behalf of the State of Wisconsin;

Mr. Max Ashwell, of Madison, Wisconsin, attorney for the Wisconsin Department of Education, of counsel for the State of Wisconsin;

Mr. William B. Ball, of Harrisburg, Pa., on behalf of the defendant;

Mr. Thomas C. Eckerle, of Madison, Wisconsin, of counsel for defendants.

BY THE COURT:

The three defendants are each charged as parents with failure to cause the child of each to attend school regularly in violation of Section 118.15(1), Wis. Stats., which provides:

> "Unless the child has a legal excuse, any person having under his control a child between the ages of 7 and 16 years shall cause such child to attend school regularly during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in session, to the end of the school term, quarter or semester of the school year in which he becomes 16 years of age."

It is undisputed or reasonably inferred from the record that the children involved were between the ages of 7 and 16 years and were not attending a high school, vocational school, technical school, private school, or any other school; that each parent concurred in his child's non-attendance and actually made a decision that such child should not attend school; that the children were in proper physical and mental condition to attend school; that none had been exempted for good cause by the district school board; and that none had completed the full four year high school course, or was otherwise excepted from attendance by statute.

The defendants contend the Wisconsin compulsory school attendance law is unconstitutional as applied to bona fide members of the Old Order Amish religious society, inasmuch as it is a substantial factor of their religious belief that they cannot send their children to high school or any school of academic or secular learning after the children have completed the basic equivalent of an 8th grade education. The record establishes that this sect feels so strongly in this respect that they are convinced that not only do they jeopardize their own relationship with God, but also those of their children, if they permit such attendance.

Defendants further contend that they would violate their religious duty by placing their children in school beyond the 8th grade level in an atmosphere inevitably hostile to and conflicting with the Old Order Amish religion's way of life, and that they would be removed for many hours each school day from their own religious environment which is so central to their lives.

Adding immensely to the difficulty and increasing the seriousness of this confrontation between such and state is the

fact that the sect believes that education is harmful beyond the 8th grade level and they flatly refuse to establish their own parochial or full-time private school staffed and administered by members of their own faith as other religious groups have been willing to do so as to better indoctrinate their children and shield them from some of the harmful influences of a public school education.

In challenging the constitutionality of Wisconsin's compulsory school attendance laws, defendants rely upon both the United States and Wisconsin Constitutions.

The United States Constitution provides in its 1st and 14th Amendments, respectively, in part, as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . ."

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Wisconsin Constitution provides in Article I, Sections 1 and 18 respectively, in part, as follows:

"All men are born equally free and independent, and have certain inherent rights, among these are life, liberty and the pursuit of happiness . . ."

"The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed . . . nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishment or modes of worship . . ."

The Green County Court in upholding the constitutionality of the Wisconsin compulsory school attendance law carefully reviewed the Federal and State decisions touching upon the infinitely delicate and conflicting constitutional right of religious freedom as opposed to the right of the State to carry out reasonable governmental functions and police powers designed to educate its youth sufficiently to exercise the benefits and responsibilities of citizenship in a republic, and to enjoy some degree of equality of opportunity in later searching for a livelihood in an increasingly technical and complex society where the uneducated face exploitation and governing hardships.

The essence of the defendants' argument is that in view of their demonstrated ability to exist successfully as law-abiding, self-supporting, and self-educating (beyond the 8th grade) citizens, their religious convictions with respect to the evils of any kind of a high school education (which is a corner-stone of their faith) should be protected and are safeguarded under the Constitution. In short, they contend that their religious belief in this respect does not amount to a grave abuse of the law endangering a paramount interest of the State sufficient for the State to have constitutional permission to limit such a religious belief by compelling the school attendance of their children beyond the 8th grade. This appears to be the real test.

For the same reasons enumerated by the County Court in its earlier decision, the Circuit Court agrees that the Wisconsin compulsory school law does interfere with the freedom of the defendants to act in accordance with their sincere religious beliefs. This Court is also acutely aware of the fact that the Old Order Amish is a sect admired and respected by

all who know them for their integrity, rugged self-reliance, high moral character, and ability to support and care for their brothers, while living and practicing the simple life without the "benefit" of a formal high school or higher education, all in accordance with the dictates of their religious beliefs.

Nevertheless, without repeating the case authorities cited by the County Court, this Circuit Court also is obliged to conclude that the compulsory school statute still represents a reasonable and constitutional exercise of the governmental function of the state. Some of the more basic considerations involved in such a decision are briefly enumerated, as follows:

(1) The law does not compel the parent to send his child to a public school. The Amish are legally free to create their own parochial high schools just as other religious groups have done, if they comply with minimum academic educational standards. Education per se need not be evil or corrupting. Private schools and parochial schools have been traditionally established in our country when education by the state or government has not been satisfactory or trusted by certain groups.

(2) The record clearly shows that a substantial number of Amish children leave the faith of their fathers when they become emancipated. The State owes a duty to a child to insure and protect his basic rights so that when he reaches the age of emancipation he will not have been deprived of a reasonable degree of education that he would have desired had he had the freedom of choice that an 8th grader cannot exercise.

(3) Although there was testimony introduced that the Old Order Amish believe that any education beyond 8th grade is and must be of a corrupting nature and contrary to the will of

God, there was actually no documentary evidence introduced to explain how and when this practice became an article of faith, and whether this is really doctrine or merely a generally recognized practice. Most religions rely on an inspired book or testament, or at least an official quotation or pronouncement by some supreme authority to distinguish what is binding doctrine from what is merely generally observed custom or church administrative rulings. Obviously in the long history of this sect it existed in areas where and when there was no such thing as an 8th grade or even school systems of any kind. Just how the 8th grade cut off point was arrived at was not explained. Age apparently was not the test, nor was the quality of the school system apparently a factor. The defendants had the burden of establishing what was an article of religious faith as distinguished from what is merely a general custom or desirable practice which is capable of various interpretations in various parts of the world by the same believers. The opinions of a minister or a church historian, while being certainly opinions of experts, are not conclusive upon the Court even when unrebutted, particularly when they leave unanswered other relevant questions. It is a well established rule of law that the weight of expert opinion evidence is for the trier of fact.

Accordingly, it is the conclusion of this Court that each of the three defendants is adjudged guilty as charged beyond a reasonable doubt and should appear in Court on the 25th day of November at 9:30 A. M. for sentencing and for the formal proceedings necessarily related to conviction, including the opportunity to make statements by way of mitigation since this is a trial de novo, unless counsel can agree to some other arrangement as a matter of convenience.

Dated this 13th day of November, 1969.

Arthur L. Luebke

Arthur L. Luebke

Circuit Judge

AMENDED MEMORANDUM DECISION

IT IS HEREBY the further order of the Court that the last paragraph of its Memorandum Decision, dated November 13, 1969, be amended insofar as it provides for any further sentencing. The Court is satisfied upon further consideration that in affirming the convictions of the Green County Court, the sentence of said Court is also automatically affirmed. In any event, it would be the intention of the Court to impose the same fine and costs as were originally imposed by the County Court. Therefore it is unnecessary for counsel and the defendants to appear for sentencing. The convictions and sentencing of the County Court are hereby affirmed.

It is further ordered that all Circuit Court papers now filed in connection with this appeal shall be retained by the Clerk of Circuit Court in said file and need not be returned to the County Court. This Judge has been advised by counsel for all the parties that this Amended Memorandum Decision meets with their approval and is sufficient to dispose of the case and will suffice for their needs in event of any appeal.

Dated this 15th day of December, 1969.

Arthur L. Luebke

Judge

SECOND AMENDED MEMORANDUM DECISION AND ORDER
(Formal Parts Omitted)

IT IS HEREBY the further order of the Court that its Memorandum Decision, dated November 13, 1969 and December 16, 1969, be amended insofar as they hold that this was a trial de novo. The Court is satisfied upon further consideration that this appeal was governed by Chapter 125 of the Laws of 1969. Said orders are therefore deemed to be in complete accordance with the provisions of said chapter.

Dated this 26th day of December, 1969.

Arthur L. Luebke
Judge